

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1106

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1106

-----X

UNITED STATES OF AMERICA,

Respondent

-V-

HAROLD NISNEWITZ,

Petitioner

-----X

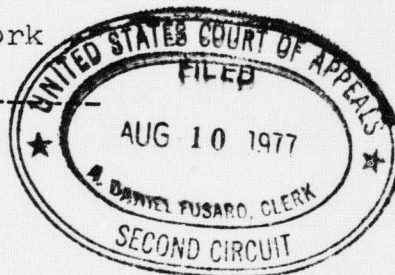
On Appeal From The United States District
Court For The Southern District of New York

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PETITION FOR REHEARING

PETITION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,
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-V-

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ARGUMENT

THIS COURT SHOULD RECONSIDER ITS DECISION
IN LIGHT OF THE FACT THAT IT REQUIRES
A DEFENDANT, IN THIS INSTANCE, A LAYMAN,
TO QUESTION AND INVESTIGATE THE ACTIONS
OF COUNSEL AT EVERY STEP OF THE JUDICIAL
PROCESS. WITHOUT KNOWLEDGE OF THE LAW AND
RELEVANT PROCEDURES, SUCH ACTIONS BY A
DEFENDANT ARE IMPOSSIBLE TO UNDERTAKE.

The central issue with respect to the case at bar, is
the incompetence of counsel appointed pursuant to the Criminal
Justice Act. For various reasons that will be stated, I
respectfully submit that this court should reconsider its
decision; reconsideration in banc.

In Appeals To The Second Circuit, Prepared by the

Committee on Federal Courts, the Association of the Bar of the City of New York, page 48, the following is stated with respect to In Banc Procedure. "In banc procedure is generally reserved for cases which the Court deems exceptionally important. These may be cases involving questions of great public interest or which present frequently recurring questions or issues which are likely to affect many other cases. " (emphasis added).

I am of the opinion that the issues which were raised in the case at bar in terms of being "exceptionally important" and "involving questions of great public interest" necessitate reconsideration by this Court.

The Sixth Amendment of the United States Constitution held that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (emphasis added).

In Powell v. Alabama, 287 U.S. 45, 69 (1932), the Supreme Court recognizing the importance of the assistance of counsel said that "historically and in practice in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard

by counsel." Further "The defendant requires the guiding hand of counsel at every step in the proceedings against him" (emphasis added).

Further, in McKenna v. Ellis, 260 F. 2d, 529, 599 (5 cir. 1960), the Court states that "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. We consider undivided loyalty by appointed counsel to client as essential to due process." (emphasis added). In United States v. De Coster, 487 G. 2d 1197, 1202, (C.A., D.C. 1973) the court held that

"The effective assistance of counsel is a defendant's most fundamental right for it affects his ability to assert any other rights he may have. The Supreme Court has observed, 'if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.'" (emphasis added).

The existence of the Criminal Justice Act and the words of the aforementioned decisions repeatedly state the importance of the assistance of counsel. In the case at bar the issue is not the assignment of counsel, but the representation not provided by assigned counsel. Numerous other decisions recognize the importance of this right for defendants. See Burton v. United States, 151 F 2d. 17, 18, 19 (C.A., D.C. 1945), also see the following with respect to the preparation required of counsel, Harshaw v. United States 542 F 2d 445,

456 (8 cir. 1976) and United States v. Thompson, 475 F 2d 931 (C.A.D.C. 1973).

A further point is that the incompetence of counsel may amount to a denial of due process. See United States ex rel Rosner v. Commissioner, N.Y.S. Department of Correction, 421 F. Supp. 781, 790 (U.S. D.C., S.D.N.Y., 1976), United States ex rel Scott v. Mancusi, 429 F 2d, 104, 115, 116 (2 cir. 1970) and United States ex rel, Johnson v. Vincent, 370 F. Supp. 379, 385 (U.S.D.C., S.D. N.Y. 1974). It should be kept in mind that numerous indigent defendants, such as myself, rely on assigned counsel as the only form of representation to aid in criminal prosecutions.

The Court in its decision held with respect to incompetence of counsel and the claim that such incompetence does not constitute "newly discovered evidence."

"...Alleged incompetence of counsel is not normally considered 'evidence,' and in any event the 'evidence' cannot be viewed as 'newly discovered,' since appellant during his trial or at least during the period of his appeal should have known of, or with due diligence could have discovered, his counsel's alleged incompetence..." (emphasis added).

The central point for reconsideration here is the incompetence of counsel could not have been discovered by myself during trial or appeal. First and foremost, the most important reason is that counsel who undertook the direct appeal never discussed with me the grounds for said appeal. I only became cognizant of the grounds for the appeal when I received a copy of the

brief and appendix which counsel had already filed with this Court. There was never any discussion between counsel, David Brodsky, Esquire and myself as to what the basis of the appeal would be. While I am not an attorney, I am of the opinion that there are numerous points which I could have communicated to counsel for the appeal. While he read the trial transcript for purposes of the grounds for appeal, it must be kept in mind that I sat through the trial while counsel for the appeal did not. I submit that the cold record of the trial in this instance could not tell him everything. As pointed out in the brief and appendix numerous errors during trial with respect to the conduct of counsel prove his lack of competence and meet the necessary tests for such a motion for new trial to be granted. United States v. Lipowski, 423 F. Supp. 864, 867 (U.S.D.C. D. N.J. 1976).

In a letter addressed to Judges, Owen, Lasker and Gurfein (hereto attached, Appendix 51A-52A), I stated with respect to my reasons for requesting the appointment of new counsel after my conviction. "I now face two additional indictments; one before Judge M. Lasker and the other before Judge Gurfein.... From my meager knowledge of the law during my recent trial I always felt that my assigned Attorney did not competently represent me...." (emphasis added). Counsel was subsequently relieved and new counsel was appointed to represent me for the direct appeal. As stated above and in my original briefs to this Court it is at this point where the errors of counsel, who represented me during trial were compounded instead of rectified. In short, I felt that counsel was incompetent and

requested that he be removed. All three judges granted my request, but the failure of counsel who handled the direct appeal to discuss the grounds with me first, only served to worsen my situation. As stated in the brief after the conviction was affirmed, counsel did not file a required motion nor inform me of pro se procedures for filing a Petition for Writ of Certiorari to the Supreme Court. (Rule 5 (e) of the Federal Rules of Appellate Procedure). I met with counsel prior to my incarceration and he informed that he had already notified Ms. Hynes, the Assistant United States Attorney, that a petition for certiorari would not be filed. No discussion of this matter between counsel and myself took place. In essence, I felt counsel, during the trial was incompetent but I never had the chance to express such feelings in time for appeal as counsel never discussed the grounds for appeal with me.

Thus in the Court's decision, the crucial phrase is that of "due diligence" with respect to my discovery of the incompetence of counsel during trial and later for appeal. Black's Law Dictionary, Revised, Fourth Edition, 1968, page 544 defines "due diligence" as

"Such a measure of prudence activity or assiduity as is properly to be expected from and ordinarily exercised by a reasonable and prudent man under the particular circumstances; not measured by any absolute standard but depending on the relative facts of the special case. Perry v. Cedar Falls, 87 Iowa, 315, 54 N.W. 225." (emphasis added). See also Ballantines Law Dictionary 1969, page 380.

In Barker et al v. Berreman, et al, 136 P 2d 576, 579 (D. Ct. of Appeals, First District, Div. 1 Calif., 1943) the Court stated

with respect to "diligence, " But as stated in Heintz v. Cooper, 104 Cal. 668, 38 P. 511 and again in Bramnock v. Bromley, 30 Cal. App. 2d 516, 86 P. 2d 1062, 1066. 'Diligence is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this Court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed.'" (emphasis added).

Further, in People v. Williams, 368 P. 2d 353, 359 (S. Ct. Calif. 1962) the Court held that: "The term 'diligence' is 'incapable of exact definition because it is a relative term' (Shivers v. Palmer, 59 Cal. App. 2d 572, 580, 139 P. 2d 952, 956) and the 'diligence' of defendant in marshaling his evidence for the trial must be determined in light of the 'peculiar circumstances involved. (People v. Goodwin, 202 Cal. 527, 539, 261 P. 1009)" (emphasis added).

In United States v. Gordon, 246 F. Supp. 522, 529 (U.S.

D.C., D.C. 1965), the Court stated with respect to diligence that:

"I am of the opinion that the highest degree of diligence would have required this procedure, but that is not the criterion. It is simply 'diligence,' which I assume means ordinary diligence. That is a relative term and depends upon the circumstances of the case..." (emphasis added) See also Black's Law Dictionary, Revised Fourth Edition, 1968, page 544 and Ballantine's Law Dictionary 1969, page 897.

Based upon the aforementioned discussion, I submit that under the "peculiar circumstances" I exercised the necessary "due diligence" with respect to determining the incompetence of counsel and taking the necessary actions in light of the circumstances. I wrote the Judges requesting that counsel be removed after stating my reasons. Under the circumstances what more could I have done? As stated in United States ex rel King v. Schubert, 522 F.2d 527, 529 (2d Cir. 1975)

"Once trial has begun ...a defendant does not have the unbridled right to reject, assigned counsel and demand another." United States v. Calabro 467 F.2d, 973 (2d Cir. 1972), cert. denied, 410 U.S. 926, 935 S. Ct. 1357, 35 L. Ed. 2d 587 (1973). (emphasis added)

In short, even though I felt that counsel did not represent me in a competent manner, there is no absolute right to have him removed once trial has begun.

In their brief, the Government contended that since the incompetency of counsel was not raised on direct appeal the issue cannot be raised on collateral attack. In United States

v. Loschiavo, 531 F 2d 659, 662, 663 (2 cir. 1976), the Court stated that

"As a general proposition, of course, claims based upon constitutional errors or on a lack of jurisdiction in the broad sense of the court's power to adjudicate the issues, are not barred from being raised on collateral attack even though no direct appeal had been taken. Sunal v. Large, 332 U.S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982 (1947); Bower v. Johnson, 306 U.S. 19, 59 S. Ct. 442, 83 L. Ed. 445 (1939)..." (emphasis added). See also Davis v. United States, 417 U.S. 333 (1974)

With respect to the failure of counsel to raise the question of incompetence on appeal in United States v. Brown, 476 F. 2d 933, 935 (C.A.D.C., 1973) the Court held that

"Although appellant's counsel on appeal (who is not trial counsel) disclaims reliance on ineffectiveness of counsel that issue necessarily lurks in the suggestion that the defendant should not be bound by the failure of his trial attorney." (emphasis added).

Of monumental importance with respect to the case at bar is the recognition that the due diligence standard should not apply when the new evidence raises the constitutional validity of a conviction. In Marshall v. United States, 436 F. 2d 155, 158, 159 (C.A.D.C., 197) the Court in a footnote to its decision at 159 stated:

"11. Thus we are of the view that the 'due diligence' standard which ordinarily governs disposition of motions for a new trial based on alleged newly discovered evidence, see Thompson v. United States, 88 U.S. App. D.C. 235, 188 F 2d. 652 (1951) should

not apply when the new evidence raises issues which challenges the constitutional validity of the conviction. Of the standard established by Fed. R. Crim. P. 52 (a) for disregarding ordinary trial errors as 'harmless' as contrasted with the higher standard which the Supreme Court in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) has held, must be applied in judging the harmlessness of constitutional error." (emphasis added).

Finally, with respect to granting a hearing in order to rule upon a claim of ineffective counsel, the Court in Powers v. United States, 446 F.2d. 22, 24 (5 cir. 1971) held that "when petitioner's allegations, if proven, would entitle him to relief, he is entitled to an evidentiary hearing and an opportunity to prove the truth of the matters asserted... If petitioner can prove that which he has asserted, that is the ineffectiveness of counsel which deprived him of his constitutional rights either by conduct during trial or by failure to advise as to rights on appeal or incorrect and misleading advice as to appeal, he must be granted relief." (emphasis added). See also Bishop v. Wainwright, 511 F. 2d 664, 666 (5 cir. 1975) and DiAngelo v. United States, 406 F. Supp. 880, 884, 885 (U.S. D.C. E.D. Penn. 1976). But most important of all, as stated in United States v. West, 170 F. Supp. 200, 204, 205 (U.S.D.C., N.D. Ohio Ed 1959)

"The important thing is that the defendants have been given a hearing on their motion and all their claims have been considered." (emphasis added)

This was not done by the District Court and I submit the Court could not adequately rule upon the motion. See Prilla v.

United States, 279 F. 2d. 407, 408 (9 cir. 1960) which holds that the discretion of the District Court cannot be interfered with "unless it can be said to have been abused." (emphasis added) and United States v. Bujese, 371 F. 2d. 120, 124, 125 (3 cir. 1967).

In short, it is my opinion that in order to adequately comply with the decision of this Court any defendant in my situation would have to question and investigate all actions by counsel before, during and after trial. This is impossible for a layman to undertake as he possesses no knowledge of the law. Further, anyone who had counsel appointed to represent him would take this fact as proof of his competence due to the fact that he is in essence an officer of the Court. See Williams v. State, 197 So. 562, 565 (1940).

In an article, "The Court Needs a Friends in Court," 60 A.B.A.J. 175, 178 (1974), Chief Judge Irving R. Kaufman of the Second Circuit wrote:

"In our adversary system, the quality of justice dispensed by the Court's is ultimately dependent on the quality of advocacy provided by the bar..."

Further,

"Our 'customers,' litigants and the general public desire the best we can give. But there is yet another reason for doing a job as carefully and as well as one can-because that is where the fulfillment is." (emphasis added).

Finally, the dissenting opinion of Judge Oakes In Rickenbacker v. Warden, Docket No. 76-2036, Slip Op. 1063 (2 cir., March

28, 1977) with respect to the continued adherence in the Second Circuit of the "farce or mockery of justice "doctrine as opposed to United States v. De Coster which has been adopted by other circuits cannot be taken lightly.

"Forty-four years ago, Mr. Justice Sutherland wrote: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). In 1976 I think our court should recognize that the right is equally meaningless if counsel is not at least reasonably competent." (emphasis added). at 1076.

CONCLUSION

For reasons set forth in the above mentioned argument regarding the monumental constitutional importance of the right to the assistance of effective counsel appointed pursuant to the Criminal Justice Act for numerous indigent individuals who came before this Court, I respectfully request that this Court should reconsider its decision.

Respectfully submitted,

HAROLD NISNEWITZ, PRO SE

PETITIONER

61-48 Austin Street

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Harold Nisnewitz
Public Accountant



835-6618

June 14, 1974

United States District Court
Southern District of New York
Foley Square
New York, N.Y.

Dear Judge Owen: Judge M. Lasker, Judge Gerfein

I am addressing this letter to you seeking advice and guidance in respect to my present predicament. I am forty-eight years of age, married, the father of two teen-age children and a New York State Licensed Public Accountant, having practised my profession honorably for the past twenty-six years in New York. I have never been arrested prior to my present predicament.

I very foolishly prepared, at the request of two or three disreputable characters whose reputation was unknown to me, applications for loans made to various banking institutions for the purposes of obtaining loans to be used in purchasing franchises in the businesses of these nefarious characters. As a result of same I was indicted in three separate indictments together with these nefarious characters in the Federal Court of the Southern District of New York. I never benefitted from my actions in any respect except to be compensated for my accounting advice in preparing the applications and for future advisement and accounting work for these individuals that were referred to me by the nefarious characters. Such future work being their personal income tax returns and the setting up of bookkeeping books and records.

I presently find myself in the following predicament. I was tried before Judge Owen, and the jury on an indictment which included two of the nefarious characters. Because of my financial situation I was obliged to request assigned Counsel and Howard Friedman, esquire, was assigned to me and represented me. The result of my trial was, one nefarious character pleaded guilty (with the possible promise of leniency) and testified for the Government. The other nefarious character was acquitted by the jury and I was the only one convicted.

I now face two additional indictments, one before Judge M. Lasker and the other before Judge Gerfein in each of which indictments I am a defendant together with three of the nefarious characters. From my meager knowledge of the law during my recent trial, I always felt that my assigned Attorney did not competently represent me. In preparation for the trial of my two outstanding indictments, I have attempted to ascertain from my counsel whether any of the nefarious characters who have been indicted with me have arranged to plead guilty and obtain leniency for themselves by testifying against me as has happened at the first trial. I cannot get any direct responses and feel that is due to the incompetency of my assigned counsel.

"p"

I have made a complete and thorough statement to the United States Probation Officer, Mr. Kahn, in regard to my recent conviction and am ready to admit my full implication in all the transactions involved. I am fearful in that the same result will follow, namely, that the nefarious characters, who benefitted from these transactions will be exonerated and I will be the one convicted although I was not the one who benefitted from the alleged illegal transactions. I am therefore respectfully requesting that the Honorable Court assign new Counsel to me so that I can feel that I am competently represented and whose legal advice I will follow in regard to my presently outstanding two indictments.

I am ready to make full disclosure to any authority and cooperate with them so that a full and equitable disclosure can be accomplished and the really guilty parties (those who benefitted from same) can be brought before the board of justice. I am therefore humbly requesting that new Counsel be assigned to me so that I can be competently advised in regard to what action I should take in regard to the two outstanding indictments against me.

Thanking you for any consideration you may show me, I am

Sincerely yours,

H. D.
Harold Nisencowitz

Judges Vote to Release 325 Lawyers Paid by U.S.

By D. J. SAUNDERS and MARCIA KRAMER

A panel of 325 lawyers paid by Congress to represent indigent defendants in Manhattan Federal Court was fired yesterday for failing to provide "effective legal assistance" to the poor.

The action, by the 32-member Board of Judges of the Southern District of New York, followed disclosures by The News last September of inadequacies in the \$19 million federal program. The News found that many lawyers, who were paid under the Criminal Justice Act, regarded the program as a hunting license to garner fees.

David N. Edelstein, chief judge of the Southern District, which includes Manhattan and 10 other counties, said the services of the panel will be terminated Oct. 31.

Edelstein said the judges took the action because the number of lawyers on the panel had become "unwieldy" and because many "were not really participating in providing defense for indigent defendants."

Former U.S. Attorney Paul J. Curran has been appointed to head a nine-member committee of lawyers to screen applications for a new panel of 100 lawyers. The new panel will go into operation on Nov. 1.

Figures from the U. S. Supreme Court's administrative office that were

obtained by The News showed that 25 lawyers on the panel got more than half the case assignments made between July 1974 and July 1976.

In addition, 10 lawyers collected more than \$300,000 in federal funds for representing poor people, which was one third of the entire Southern District disbursement during the 1974-1976 period.

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